Supreme Court of the United States

OCTOBER TERM, 1946.

No. 156.

E. M. GEORGE-HOWARD AND WOODDY SWEARINGEN, PETITIONERS,

VS.

FEDERAL DEPOSIT INSURANCE CORPORATION, RESPONDENT.

REPLY BRIEF OF PETITIONERS ON CERTIORARI.

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Although the statement beginning on page 2 of the Answer Brief of Respondent is a fair summary of the proceedings below, yet we are constrained to call attention to some of the statements therein.

Counsel have stated at page 2 of their brief, that "more than one-half of the capital stock of the FDIC is owned by the government of the United States (R. 76, 77)." The record reference is to the affidavit of E. F. Downey, Secretary of the FDIC, showing the amount of capital stock which had been issued respectively to the

government of the United States and to the reserve banks. We have challenged this statement in number IV of the questions presented in our petition for a writ of certiorari.

On page 3 of the Answer brief, the statement is made that "on December 2, 1937, the bank was closed by its directors," etc. Record 56 and 65 cited do not support the statement. On the contrary, Record 65 shows that the bank was closed at the instigation of Respondent for no reason which the law creating the FDIC sanctions. This matter is the subject of Point VI of the petition for a writ of certiorari.

The indication on page 5 of their statement that the liquidation of the Nevada Trust Company terminated on the deposit of the trust fund with petitioner, Wooddy Swearingen, is the subject of question VI in the petition for certiorari, wherein we contend that the liquidation proceeding was not then concluded.

Counsel for Respondent have undertaken to discuss only four propositions contained in the petition for certiorari. The questions which we have presented to the court, yet with which Respondent has not undertaken to deal, we believe should be considered as admitted, and we suggest they alone are sufficient to justify the issuance of the writ. We will deal only with the four propositions they have questioned.

QUESTIONS PRESENTED IN THE PETITION FOR CERTIORARI.

I.

Did not the Supreme Court of the United States, instead of the Circuit Court of Appeals have jurisdiction of any appeal which Respondent might have taken from the United States District Court; and should not the

opinion of the Circuit Court of Appeals, therefore, be quashed under Section 349(a), Title 28, U. S. C. A.?

Since the District Court held that the provision of Title 12, U. S. C. A., Section 264(j), that,

> "all suits of a civil nature * * * to which the Corporation shall be a party shall be deemed to arise under the laws of the United States,"

is unconstitutional, the appeal, if any, should have been directly to the Supreme Court under the provision of Title 28, U. S. C. A., Section 349(a). This statute set out at page 21 of Respondent's answer brief, provides:

> "In any suit or proceeding in any court of the United States to which the United States or any agency thereof * * * is a party, * * * and in which the decision is against the constitutionality of any Act of Congress, an appeal may be taken directly to the Supreme Court of the United States by the United States or any other party to such suit or proceeding upon application therefor, or notice thereof, within 30 days after the entry of a final or interlocutory judgment, decree or order; * * *"

Counsel for Respondent have treated the Corporation as an agency of the United States, and there is some support for this consideration in the concurring opinion of Mr. Justice Jackson in the case of *D'Oench, Duhme & Co.* v. *FDIC*, 315 U. S. 447. Treating Respondent as such agency, then everything was present to suggest that the appeal should have gone to the Supreme Court, instead of the Court of Appeals.

The argument of counsel for Respondent, beginning on page 8 of their brief, that an appeal to the Supreme Court under this statute is merely optional, and that an appellant might appeal either to the Supreme Court under this statute, or to the Circuit Court of Appeals under

other statutes, is not sound. There is nothing elective about this statute in the use of the word "may" instead of "shall," except that it is elective with a defeated litigant merely to appeal or not appeal. The history of the foregoing statute, as indicated by 81 Cong. Rec. 3270, 3272 and 8507, cited by respondent, does not support their contention. The bill was introduced apparently under the belief that the question of the constitutionality of an act of Congress was vested with a public interest, and that the fate of a Congressional act should not be left to the hazard of private litigants. The bill before the Judicial Committee provided that when the constitutionality of an act of Congress was challenged, then the District Court should certify the fact to the Attorney General, and the Attorney General should thereupon have a right to intervene in the case, in order to bring what the committee thought would be a more thorough consideration to the question. The only questions of discretion which were discussed were whether the District Court might use its discretion in notifying the Attorney General, or whether the requirement should be mandatory upon the District Court, leaving it discretionary with the Attorney General as to whether he would intervene in support of the act questioned. The quotation on page 10 of Respondent's brief went only to whether the Attorney General should use his discretion at all in appealing to the Supreme Court; not whether he might appeal to the Supreme Court or the Circuit Court of Appeals.

The provision of the Act, *supra,*

> "and in the event that any such appeal is taken, any appeal or cross-appeal by any party to the suit or proceeding taken previously, or taken within 60 days after notice of an appeal under this section, shall also be or be treated as taken directly to the Supreme Court of the United States,"

does not lend support to the thought of an election as between the Supreme Court or the Circuit Court of Appeals. That provision evidently was written in view of the many turns and characters of cases within the limits of the statute. The statute provides an appeal to the Supreme Court "in any suit or proceeding in any court of the United States," etc.

There are quite a number of statutes which provide appeals to the Supreme Court, and fixing different times in which appeals may be taken. Such appeals may in some instances be taken from preliminary orders, interlocutory judgments or decrees or injunctions, according as the exigencies of the cases may suggest, and before there may be any ruling against a Federal statute, or even before a pleading may be filed questioning the constitutionality of a Congressional act. In event of an appeal prior to rulings of the District Court, injecting such a constitutional question into the case, an appeal may, if other circumstances allow, be made to the Court of Appeals; but such an appeal would under this statute be carried to the Supreme Court as a matter of course, in event of a later appeal from a decision holding a Congressional act unconstitutional. Or, if under other statutes allowing appeals to the Supreme Court within sixty days, a litigant should appeal after appeal under the act in question, his appeal would also be to the Supreme Court. The last sentence of the statute as given on page 22 of Respondent's brief provides,

> "This section shall not be construed to be in derogation of any right of direct appeal to the Supreme Court of the United States under existing provisions of law."

If the Congress had desired to provide an election as to which court a litigant might go when the constitu-

tional question contemplated by the statute is involved, they surely would have provided in the foregoing sentence that the appeal provided by the section also should not be in derogation of any right of appeal under existing statutes to the circuit courts of appeal. This statute appears to be the only one providing specially for an appeal in cases attacking the constitutionality of Congressional acts. Considering the reasons, as disclosed by the Congressional Record, for enacting the statute, it must be regarded as an act intended to obtain both an expeditious hearing, and one in which the law may be assured of adequate consideration.

The following acts, together with amendments, provide for appeals to the Supreme Court, and they were doubtless in the mind of the Congress in enacting the statute in question.

Section 29, Title 15, U. S. C. A., provides that appeals to the Supreme Court from final decrees may be taken within sixty days, in cases involving monoplies and combinations.

Section 45, Title 49, U. S. C. A., allows appeals to the Supreme Court from final decrees in equity cases in the district courts within sixty days, in transportation cases.

Section 44, Title 49, U. S. C. A. (Called the Elkins Act), provides for an expeditious appeal to the Supreme Court in transportation cases in which the United States is a party.

Section 682, Title 18, U. S. C. A., provides for a writ of error in behalf of the United States from a district court to the Supreme Court within thirty days in criminal cases.

Section 47, Title 28, allows appeals from interlocutory injunctions against orders of the Interstate Commerce Commission, within thirty days.

Section 217, Title 7, U. S. C. A., makes other statutes relating to appeals applicable to certain cases affecting orders of the Interstate Commerce Commission.

Hence it can be seen that the provision that the act in question should not be in derogation of other rights of appeal to the Supreme Court was necessary for the sake of clarity, and to avoid the possibility of conflict.

It does not appear to have been the policy of legislation to allow a litigant to select the appellate court to which he desires to go. And the very nature of the appeal rejects such an elective course. Unlike courts of original jurisdiction in which the institution of a suit in one court is not necessarily to the exclusion of other courts, an appeal to an Appellate Court is exclusive. Otherwise, courts of last resort would be in continual conflict, and the law could not be finally settled with any degree of decent dependability. Furthermore, if a litigant were given an election as to which United States appellate court he might go to the exclusion of other Appellate Courts (as the nature of an appeal demands), then the judicial power of the United States would not be conferred under the Constitution upon the Supreme Court and such inferior courts as Congress may from time to time ordain and establish; but to such an extent of election, would be conferred upon litigants. Such would be absurd. Appellate statutes have provided for appeals to this or that court according to the classes or natures of cases, instead of preferences of litigants.

The whole question of election is ably discussed and fully determined in *Jackson* v. *Cravens,* 151 C. C. A. 193, 238 Fed. 117. In that case the appeal was from an order of the District Court for the Southern District of Florida, denying an interlocutory injunction applied for by the plaintiffs. The bill was filed

to restrain the Inspector of Naval Stores from taking steps to enforce an alleged unconstitutional statute of that State. The proceeding followed the course required for referring the question to other judges of the Circuit and District Courts. The statute involved provided,

> "An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction in such case."

The Court said:

> "The contention of the plaintiffs (appellants) is that this provision is permissive only, and does not provide an exclusive remedy for an appeal, but that resort may be had at the election of the plaintiffs to the remedy provided in Section 129 of the Judicial Code by appeal to this court. The defendants (appellees) contend that the appellate remedy provided by Section 266 is exclusive.
>
> (1-3) It is conceded by appellees that the terms of section 129 are broad enough to cover this appeal, unless they are to be restricted by the effect of section 266. The appellants also concede the rule of construction that where an earlier statute provides a remedy covering all cases, and a subsequent statute creates a specific remedy for a particular case, the latter is to be construed to be exclusive, unless the purpose of the Legislature or the convenience of the public demand a different rule of construction, and that this is true, though the language of the subsequent act is permissive, rather than mandatory. * * *
>
> For these reasons we see no reason for departing from the settled rule of statutory construction, recognized by the Supreme Court, that the general terms of a prior statute are not to be considered as covering the particular terms of a subsequent statute, but, on the contrary, the latter are to be considered as withdrawn from the operation of the former,

unless for good reason. *United States* v. *Chase*, 135 U. S. 260, 10 S. Ct. 756, 34 L. Ed. 117; *Townsend* v. *Little*, 109 U. S. 504, 3 S. Ct. 357, 27 L. Ed. 1012; *Cook County National Bank* v. *United States*, 107 U. S. 445, 2 S. Ct. 561, 27 L. Ed. 537. At the time of the enactment of the act of March, 1891, now represented in part by section 129 of the Judicial Code, and at the time of the adoption of its amendments, no such remedy as that now provided for by section 266 of the Judicial Code was in existence, and Congress could have had no express intention of making the appeal given by section 129 applicable to the new remedy. Section 294 of the Code (Comp. St., 1913, 1271) prevents giving the re-enactment of section 129, when the Code was adopted, a different construction from that which it originally had.

We think the contention of appellants also conflicts with the rule of construction that where a statute provides a new, specific, and complete remedy, and fully covers the subject-matter, the provisions of the statute will be looked to alone, and resort will not be had to prior existing general remedies as cumulative. * * * We think Congress thereby intended to fully cover the subject-matter of appeals from such orders, and that the remedy so provided was exclusive, not cumulative. The rule was laid down by the Supreme Court in the cases of *Brown* v. *United States*, 171 U. S. 631, 19 S. Ct. 56, 43 L. Ed. 312, and *Laurel Oil Co.* v. *Morrison*, 212 U. S. 291, 29 S. Ct. 394, 53 L. Ed. 517, that:

> 'Where a statute provides for an appeal or a writ of error to a specific court, it must be regarded as a repeal of any previous statute providing for an appeal or a writ of error to another court.'

* * * The state and its citizens are also concerned, and this makes a speedy and authoritative

settlement of the question of more importance even than the preservation of the status in the instant case. Giving to the litigants the election to delay such authoritative decision by an appeal to an intermediate court would defeat this purpose.

Because of the views expressed, we are constrained to hold that the appeal provided by section 266, direct to the Supreme Court, is exclusive, and that the appeal to this court should be dismissed, at appellants' costs; and it is so ordered."

II(b).

Is it not a judicial question whether Respondent's claim arises under the laws of the United States, and is not the Congressional declaration of subsection (j) fourth, Section 264, Title 12, an unwarranted invasion of the judicial power as held by the District Court (R. 37, 39) and void?

Respondent predicates its argument in support of the jurisdiction of the District Court upon the thought that the rule of *Osborn* v. *Bank of the United States,* 9 Wheat. 738, is applicable to those corporations in which the government owns more than one-half of the capital stock and upon its contention that the Government does own more than one-half of the capital stock of the FDIC. We suggested on page 17 of our petition for the writ of certiorari, that the *Osborn case, supra,* is no longer controlling in view of the case of *Gully* v. *First National Bank,* 299 U. S. 109, the latest expression of the Supreme Court. Respondent admits the full effect of the *Gully case, supra,* but considers that merely one sentence therein saves the rule of the Osborn case for them (Resp. Brief 13). That sentence is, "only recently we said after full consideration that the doctrine of the charter cases was to be treated as exceptional, though

within their special field, there was no thought to disturb them." The Circuit Court of Appeals also seized upon this one sentence in holding to the rule of the Osborn case (R. 91). It would be quite interesting for either Respondent or the Circuit Court of Appeals to have attempted to spin out or define the "special field" to which the Osborn case rule is still applicable, against the statement in the Gully case, l. c. 114:

> " 'A suit to enforce a right, which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under those laws, for a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction or effect of such a law, upon the determination of which the result depends' * * *. Today, even more clearly than in the past, 'the Federal nature of the right to be established is decisive—not the source of the authority to establish it.' "

The rule of the Osborn case that the causes of action of Federally incorporated companies all arise under the laws of the United States, and therefore, the Federal courts are open to them by the mere fact of their Federal incorporation, is not a constitutional provision nor a legislative act within constitutional limits; but is merely a rule of construction. Like any other rule of construction, it is subject to be overruled, or superseded by later holdings of the Supreme Court. The "special field" in which the *Gully case, supra,* left the Osborn case rule applicable must be merely that "field" of cases to which it and successive cases announcing the rule had already been applied. Except for this, we believe the special "field" can have little or no application or meaning.

We suggest again that the rule of the Osborn case is also barred by the statute, Title 28, Section 42, U. S. C. A.,

providing that no district court shall have jurisdiction of any action or suit against a corporation for the mere reason that it was incorporated under an act of Congress. This provision is all embracive. The provision that this statute shall not apply to those Federally incorporated companies wherein the Government of the United States is the owner of more than one-half of their capital stock, can hardly be considered to embrace any and all Federal incorporations, irrespective of their functions, and irrespective of the changing ownership of their shares of stock. If it did extend to them, then today such corporations might have access to the Federal courts in their litigation, and tomorrow, by changing ownership of shares, they would lose that access. As suggested in our petition for the writ, such a construction would convict the Congress of a mere caprice, and such a construction we believe could serve no legitimate exercise of authority either of Congress or of the courts. The statute abolished the Osborn rule, but provided that certain corporations in which the *act of Incorporation itself* fixed a majority of the ownership of the capital stock in the Government, and which stood as an agency of the Government, might still have a right in the Federal courts; the right, however, still being subject to the law as declared in the Gully case, and depending upon an affirmative showing that the statute creating the corporation, provided for a majority ownership of stock in the Federal Government.

IV(b).

Does not the record fail to sustain the holding of the Circuit Court of Appeals that the FDIC is one in which the Government owns more than one-half of the capital stock?

We state again that the affidavit of E. F. Downey, Secretary of the FDIC (R. 76) does not show the majority

of the ownership of the capital stock in the Federal Government. The statute creating the corporation provided an appropriation of $150,000,000 to be available for capital stock. The affidavit shows that 1,500,000 shares were issued to the Federal Government, of the aggregate value of $150,000,000, thereby exhausting the appropriation. The statute provided that one-half of the surplus of all the Federal reserve banks should be subscribed for capital stock, and that one-half of the subscription should be paid at the time of the subscription; that the other half might be called for at the behest of the directorate. The affidavit merely shows that $139,299,556.99 of the money of Federal reserve banks had gone into Class B stock. There is no showing what one-half of the surplus of the Federal reserve banks was.

Realizing that the proof of majority ownership in the Federal Government was wanting, Respondent has attempted to buttress its claim by referring to the annual reports of FDIC to Congress for each year from 1934 (Note 2, pages 12 and 13 of the Answer Brief). These reports show no more than the affidavit of Mr. Downey. They do not show what one-half of the surplus of the Federal Reserve banks amounted to. Since Respondent has turned away from the record, we believe we are justified in furnishing other information. In the 20th Annual Report of the Federal Reserve Board for 1933, at pages 24 and 25 there is shown approximately $37,000,000 derived from assessments on participating banks, which became a part of the temporary fund of the FDIC. Title 12, Section 264, subdivision (i) (1), U. S. C. A., provides that the Temporary Federal Deposit Insurance fund and the funds for Mutuals, theretofore created, should be consolidated into a permanent insurance fund, and should be held by the corporation for its uses and purposes. Title 12, Section 264 (h) (5), recognizes that the equitable ownership of this

fund is in the contributing banks, and it provides that, instead of the fund being returned to the banks it shall be held, and the contributing banks shall be given credit out of it for assessments, while they continue their participation as insured banks. Section 264 (i) (3), Title 12, U. S. C. A., appears to provide for the return of the proportionate part of this temporary fund upon the withdrawal of a bank from the Federal Deposit system.

If the FDIC were dissolved today, the banks which contributed that fund would be entitled to share ratably in the distribution of the FDIC capital stock or property.

It can be seen from the foregoing that the temporary insurance fund does not inure to the stock of either the Federal reserve banks nor to the stock of the Government; but is confused with the contributions of the Government and of the Federal Reserve Banks, and when the amount of the fund is added to the amount of the Federal Reserve banks' investments, an aggregate of approximately $180,000,000 of capital stock is shown in the hands of others than the United States. The United States ownership of capital stock is therefore approximately $30,000,000 less than the capital stock of others.

We have shown in our petition for the writ and the suggestions (page 18), that the capital stock of a corporation is the property of the corporation, and have cited ample authority therein to that effect. The statute, Title 28, Section 42, U. S. C. A., with respect to corporations in which the Government owns more than one-half of the capital stock, should be construed in the light of those opinions; for they express the law at the adoption of the statute. Construing the statute in that light, and laying it alongside the law creating the FDIC, it shows that the Government of the United States is a minority stockholder, and, therefore, not entitled to be in the Federal courts by the mere fact of its Federal incorporation.

On page 13 of the Answer Brief, Respondent refers to Title 12, Section 264 (j) (4), providing that the corporation shall become a body corporate, and as such shall have the power "to sue and be sued, complain and defend, in any court of law or equity, State or Federal." On pages 16 and 17 of our petition and suggestions, we called attention to the case of *Bank of The United States* v. *Devcreaux et al.*, 5 Cranch 61, in which a similar provision in the statute creating the United States Bank of that day, had been held not to broaden the jurisdiction of the Federal courts; but rather that the provision merely expressed the incidental power of the corporation as such to sue in any court on the same basis that an individual might sue. In other words, the provision is but a further recognition of the corporation as being a legal entity. We quoted from the Devereaux case at page 17 of our petition for the writ. We submit that this is a true expression of the law, and is altogether applicable to the statute in question, *supra*. We have found no holding in which this opinion has been overruled. If this Devereaux case does not express the correct rule, then the Congress, by the act which that case construes, would have invaded the judicial power of the United States as placed in the Federal Courts; for the judicial power is to be determined not by the fiat of Congress, but rather by the Courts from the facts and questions presented in suits at law or in equity.

The law creating the FDIC is not involved in this proceeding, and no right to be in the Federal court can rest upon that statute. The FDIC was not within the sanction of the statute creating it in the acts of purchasing the deposits and paying the depositors for them and in presenting its claims in the Missouri Circuit Court. The statute, *supra*, provides for payment of claims, only in

cases of those banks which are unable to meet the demands of its depositors. Neither the pleading nor the record shows that the Nevada Trust Company, whose deposits were purchased by the FDIC was in a failing condition. On the contrary, the record shows (R. 64-65) it was closed for no reason except the mere dissatisfaction of some of the auditors of the FDIC with the management. Without showing any bad financial condition, the record shows threats that if the management were not changed, then the State Finance Commissioner would be prevailed upon to close the bank. There is no statute justifying the action of the FDIC, nor its agents, as far as anything may be discerned from the record. The FDIC at the outset was challenged in this respect. It had a chance to offer evidence showing the bank was in a failing condition, if that had been the fact. It did not do so, although it was exceedingly well represented by counsel. Failing in its evidence, no other conclusion can be reached than that it was "high-handed," in procuring the closing of the bank. It doubtless realized its wrong, for it has based its cause of action altogether upon assignments which it took from depositors. Those assignments were not required under the law of its creation, and do not make a subrogation under the law. Their rights were purely contractual. They merely purchased the claims of the depositors, and presented them for payment, after having contrived to cause the bank to be closed. Their assignments were altogether local. They dealt with the local bank, and their claims were no more than the ordinary assignment of a promissory note or an open account upon which anyone might bring a suit in a local Court, or which any holder might present to the obligee, whether bank or individual. We say again, that since the FDIC acted wrongfully in causing the bank to be closed, then

bought up the claims of the depositors, and presented them for payment, all in sequential action, that it acted wrongfully without the support of the law, either of its creation, or of any other law; and it should therefore not be entitled to recover interest. The hand of the FDIC has been called in this matter throughout. It has attempted to ignore this wrong at all times. It should not be allowed further to escape this proposition.

We refer again to the proviso of Title 12, Section 264 (j) (7), which we set out and discussed at pages 10 and 19 of our petition and suggestions, and suggest that that proviso cast this suit altogether into the lap of the Missouri court.

We also refer to our question VI and suggestions at pages 10 and 20, of our petition and suggestions, with respect to the question of comity, which Judge Otis of the District Court found to be such as to cause him to dismiss the suit, and suggest that under the Missouri law and authority therein cited, that the court could not divest itself of jurisdiction until there had been a final distribution of all the assets, and that the deposit of a part of the assets with the escrow was not a distribution of the assets, so that the liquidation could be considered as terminated. The language of the escrow agreement with respect to bringing a suit over the escrow fund in a court of competent general jurisdiction is no more than the provision of the Missouri statute, Art. 1, Ch. 39, R. S. Mo., 1939, which provides for a timely suit within the Missouri special statutes of limitations in that Chapter, and in which only the Missouri court is allowed to deal with the claim.

We submit that the case of *State ex rel.* v. *Sevier*, 337 Mo. 1174, 88 S. W. 2d 154, cited at page 12 of our petition and suggestions, is the correct expression of the Missouri law in its holding that the Circuit Court of the

County where the closed bank is located, has the exclusive jurisdiction of all claims against the assets of a bank in liquidation under the Missouri law.

In conclusion, we are thoroughly convinced that the District Court was without jurisdiction to hear and determine the questions involved in this case and that Judge Otis correctly dismissed the case for the reasons set out in his opinion (R. 37), 55 Fed. Supp. 921. We are also convinced that the Respondent was not authorized, in view of Section 349(a), Title 28, U. S. C. A., to appeal to the Circuit Court of Appeals and we are further convinced that the Circuit Court of Appeals was without jurisdiction to hear and determine the case on appeal as jurisdiction on appeal was vested exclusively in the Supreme Court. This contention is fully supported by the holding of the Circuit Court of Appeals, Fifth Circuit, in the case of *Jackson* v. *Cravens*, 151 C. C. A. 193, 238 Fed. 117. And by the holding of the Circuit Court of Appeals, Third Circuit, in the case of *Safe Harbor Water Power Corporation* v. *Federal Power Commission*, 124 F. 2d 800, l. c. 804 (1-4), first paragraph, wherein the holding in *Jackson* v. *Cravens* is cited with approval and quoted from.

In view of all of which we submit that this Court should grant Certiorari and quash the decision and opinion of the Circuit Court of Appeals and direct the Circuit Court of Appeals to dismiss Respondent's appeal.

Respectfully submitted,

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